Supreme Court of the United States.

No. 54.—October Term, 1904.

The United States, Appellant, *vs.* Chicago, Milwaukee and St. Paul Railway Company et al.	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[December 12, 1904.]

The United States on the 6th day of March, 1893, filed this bill in the Circuit Court of the United States for the District of Minnesota for the purpose of setting aside the certification, under the land grant of Congress, (14 Stat. 87,) made by the Secretary of the Interior, of the land described in the bill, to the State of Minnesota, for the benefit of the railroad company, and also to set aside the conveyance thereof by the State to the railroad company, and by the company to one of the individual defendants. A supplemental bill was filed, by leave, March 4, 1901, bringing in by service of the supœpna other individual defendants.

The suit was brought under and pursuant to the act of Congress of March 3, 1887, (24 Stat. 556,) entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes."

Upon trial in the Circuit Court the bill was dismissed, and the decree of dismissal was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit, (116 Fed. Rep 969,) and from that decree of affirmance the Government has appealed here.

The facts upon which the controversy arose are, in substance, as follows: On the 4th day of July, 1866, Congress passed an act making an additional grant of lands to the State of Minnesota, (14 Stat. 87,) to aid in the construction of railroads in that State. The Southern Minnesota Railroad Company was at the time of the passage of the act of Congress a corporation organized under the laws of Minnesota, with the power to construct a line of railroad as mentioned in that act. The legislature of Minnesota, on the 25th day of February, 1867, transferred the land granted to it by the act of Congress to the railroad company, subject to the provisions of that act and also of the State statute.

Among the lands thus transferred was a lot eighty acres in extent, in Faribault County, Minnesota, being the property in dispute in this suit. The land was within the indemnity limits of the grant by Congress to the State, as determined by the map of definite location of the railroad, which

became effective February 25, 1867. The deficiency in what are termed the "place" lands was largely in excess of eighty acres. On the 29th day of November, 1870, the Southern Minnesota Railroad Company selected this tract in section 35 in lieu of part of the land lost in the granted limits, and the land was certified to the State of Minnesota by the Secretary of the Interior, March 25, 1871, for the benefit of the railroad company, and on the 8th day of August, 1871, the State of Minnesota conveyed it by deed to the railroad company. In March, 1868, the company had mortgaged all of its property, including the land granted under the act of Congress and all subsequently acquired property, to secure the payment of its bonds. This mortgage was foreclosed and the property sold and conveyed to a new corporation by the name of the Southern Minnesota Railway Company, and the land was conveyed to that company. On the 5th day of January, 1885, the railway company, by contract in writing, agreed to sell the land in dispute to one A. Boyeson for the sum named in that contract. Boyeson assigned his interest in the contract, on the 6th of January, to Fredericksen, who, on the 1st day of April, 1885, assigned it to the defendant, Thomas S. Thompson, and, in turn, on the 3d day of February, 1888, the latter assigned it to Ericksrud, who paid the balance due upon the contract and received the warranty deed for the land from the railway company on the 20th day of March, 1888.

Ericksrud died intestate on March 27, 1888, and on November 6, 1888, the land was decreed by the probate court to be the property of the widow and heirs at law of Ericksrud, and they remained in possession, and on the 24th of May, 1899, these heirs at law still being in possession, conveyed the same to the defendant Woodwick for the sum of two thousand dollars cash. This is the title of record coming from the United States to the State, thence to the railroad company and, by mesne conveyances, to the defendant Woodwick, and there was nothing of record showing that any other person was entitled to the land at the time when Woodwick paid the two thousand dollars to the heirs of Ericksrud and took the deed therefor. The defendant Donovan, however, lays claim to the land in question pursuant to the facts now to be stated.

Prior to the passage of the granting act of Congress, above referred to, one Luman Barclay had, on the 21st day of June, 1866, entered this land in controversy, and also the eighty acres in section 26, adjoining, as a homestead. In the following year (1867) Barclay abandoned the land and went to Canada. Some time after his departure, and in the same year, (1867,) Donovan, the defendant, sought to acquire a homestead on Government land. He examined the land for which Barclay had made his entry, and decided to enter it as a homestead. He went to the United States local land office for the purpose and was informed by the register

of the land office that he could not make the entry until Barclay's entry was cancelled. He was also informed that if he wished to make a claim that Barclay had abandoned his interest, he should publish notice of the time and place where he would make proof upon that matter. He published a notice accordingly, for three weeks, and paid nine dollars as the cost thereof, and in the fore part of August, 1867, made proof that Barclay had abandoned his homestead claim. Donovan insists that he was given to understand that he could enter the land as a homestead, as soon as the local land office received notice from the General Land Office at Washton that Barclay's entry was cancelled. He thereupon made one application to enter both tracts of land—the eighty acres in section 26 and the eighty-acre tract in question in section 35, but left the date of application blank, because he could make no entry for the lot in section 35 until Barclay's entry had been cancelled. He did this, as he or his witness Bullis said, to head off any other applicant for the land, and he left the application with the local land office. He then went into possession of section 26 and commenced the erection of a house thereon, and he says he commenced the cultivation of a small part of the tract in section 35. This was in the fall of 1867. The Barclay entry was duly cancelled at Washington on the 14th of January, 1868, and notice thereafter given to the local land office, and Donovan was notified of the fact. On the 6th day of June, 1868, Donovan went to the local land office and applied to enter the two tracts of land. He was there informed that the odd-numbered sections within twenty miles of the road had been withdrawn from market, and that such withdrawal included the section in question, and that he could not, therefore, enter the eighty acres in section 35 as a part of his homestead.

Donovan acquiesced in this determination of the local land office, and made his entry for the eighty acres in section 26. The old application for the two lots was destroyed and a new one made out for the lot in section 26. He thereafter used the land in section 35 in connection with his own in section 26, and cut grass upon and ploughed some of it, but it does not appear that he laid any claim to it as land which he had attempted to enter and which had been improperly or wrongfully refused him. His house and other permanent improvements were on section 26. At the time he made proof (in 1875) for the eighty acres in section 26, Donovan says he offered to make proof also as to the land in section 35, but his offer was rejected because, among other reasons, he had not entered the land in that section. He has obtained his patent for the eighty acres in section 26.

On the 26th day of June, 1883, Donovan applied at the local land office to enter this tract of land in section 35 as an additional homestead, under the act of March 3, 1879, (20 Stat. 472,) and the register certified that the application was for surveyed lands of the class the applicant was legally entitled to enter under the homestead act of 1862. In other

words, unappropriated public lands of the United States. The application was rejected upon the ground that the land so applied for had been certified to the State of Minnesota for the benefit of the railroad company. Donovan appealed from this rejection to the Commissioner of the General Land Office, where, it is stated, the matter is still pending and undetermined.

In 1885 the defendant Thompson, an assignee of the contract made by the railway company with Boyesen, went into possession of the eighty acres in section 35, and ordered Donovan off the same, and Donovan left the land accordingly. After Thompson took possession of the land, April 1, 1885, Donovan, in the same year, commenced a suit in the District Court of Faribault County to obtain possession of the land, and on or about the 24th of March, 1887, the State court decided that Donovan had no title to the land or right to the possession of the same, and that Thompson had the right to the possession thereof under the contract already mentioned. This judgment against him in the State court was never appealed from by Donovan, nor has it ever been vacated, modified or reversed. In 1888 Donovan applied to the Land Department at Washington for relief by reason of the act of Congress of March 3, 1887, heretofore referred to. In relation to that application the Commissioner of the General Land Office, on February 14, 1889, addressed a letter to the Secretary of the Interior, and therein spoke of Donovan's application for the institution of proceedings under that act of Congress, and said that Donovan had no title to the land, but he sent all the papers to the Secretary for review by him. On the 1st of April, 1889, the Secretary replied to the communication of the Commissioner of the General Land Office, and therein reversed his holding, and directed the latter to make a demand of the railway company for the reconveyance of the land, as provided for in the act. On the 12th of April, 1890, the Commissioner sent a communication to the Secretary, informing him that a demand for the reconveyance of the land had been made April 9, 1889, upon the railroad company, and that no answer had been made, although more than a year had elapsed since the demand. On the 16th of April, 1890, the Secretary of the Interior transmitted the letter to the Attorney General with a request that suit might be instituted to have the certification of the land in question by the Land Department to the State of Minnesota set aside and cancelled if, in the opinion of the Attorney General, the suit could be maintained. After waiting three years, and on the 6th of March, 1893, the United States filed its bill against the Chicago, Milwaukee and St. Paul Railway Company as successor in interest of the former companies, and also against the Southern Minnesota Railway Company, Michael Donovan, Thomas S. Thompson and C. C. Ericksrud. On August 11, 1894, the companies answered the bill. Donovan did not answer it until

March 6, 1901, and then confessed the same, and prayed that the relief asked for might be granted. On March 4, 1901, the United States filed a supplemental bill, wherein it was stated that no service had ever been made upon Thompson or Ericksrud, and that on June 24, 1899, the heirs of Ericksrud had joined in a deed conveying the land in question to Louis K. Woodwick. Process was prayed against the defendants, the heirs of Ericksrud, and also against Woodwick, and subpœnas were served on them, and on May 2, 1901, they answered the supplemental bill. A special examiner was appointed to take testimony, and on the 13th of January, 1902, he submitted his report of the testimony taken in the suit, to the court.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The Attorney General contends that before the passage of the act of Congress granting the land (July 4, 1866) Barclay had made legal entry upon the books of the local land office of the land in question, under the homestead laws of Congress, and that such legal entry was in existence at the time of the passage of the act of Congress of July 4, 1866; that by reason of such entry the land was excepted from the grant under that act, and that when Barclay abandoned his homestead claim upon the land it immediately became public land of the United States, and did not then pass under the grant to the State pursuant to the act of July 4, 1866, and it was therefore not legally withdrawn from market by any act of the Land Department, nor could it be certified to the State, and that the attempt to do so was not only erroneous, but absolutely void; that at the time when Donovan made application to enter the land, in June, 1868, it was part of the public lands of the United States, open to entry, and his application, although he had done all that he could, was wrongfully denied by the local land office; that thereafter the filing of the map of definite location by the railway company, and its selection of the land in question, and the certification of the land by the Secretary of the Interior to the State, and the conveyance by the State to the railway company, and the contract and conveyances following thereon, conveyed no interest in or title to the premises in question, but that they rightfully belonged to Donovan, and therefore the certification by the Land Department, etc., should be set aside, to the end that the land may be transferred to Donovan as demanded in the bill.

On the other hand, it is insisted on the part of the defendant Woodwick that the action of the Land Department officials in withdrawing the land in question from market was valid and within the jurisdiction of that department; that the selection of the land by the railway company was proper, as being within the indemnity limits of the grant by Con-

gress, and that its certification by the Secretary of the Interior to the State was within the power of that officer, and the act was not, therefore, beyond his jurisdiction, and that his certification and the action of the State conveyed a good title, or, at any rate, that the defendant Woodwick was a *bona fide* purchaser of the land, and as such his rights were preserved under the act of March 3, 1887. (24 Stat. 556.)

If Woodwick is protected under that act, as a purchaser in good faith, even against Donovan, it is unnecessary to pursue an inquiry as to the existence of any other defense. We are of opinion that Woodwick is protected under the fourth section of the act. The plain intent of that section is, as stated by Mr. Justice Brewer in delivering the opinion of the court in *United States* v. *Winona &c. Railroad*, (165 U. S. 463,) to secure one who in good faith and as an honest transaction purchases the land, and to leave to the Government a simple claim for money against the railroad. The justice said (pp. 280–281):

"It will be observed that the technical term '*bona fide* purchaser' is not found in this section, and while it is provided that a mortgage or pledge shall not be considered a sale so as to entitle the mortgagee or pledgee to the benefit of the act, it does secure to every one, who in good faith has made an absolute purchase from a railroad company, protection to his title irrespective of any errors or mistakes in the certification or patent.

". . . These being the provisions of the act of 1887, the act of 1896, (29 Stat. 42,) confirming the right and title of a *bona fide* purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a '*bona fide* purchaser,' has nevertheless purchased in good faith from the railroad company."

The counsel for the Government, while strenuously denying that the legal title to this land passed to the State of Minnesota, by virtue of the certification, in 1871, admits in his brief that if Woodwick bought the land as a *bona fide* purchaser in 1899, and acquired the legal title to the same, then at that present time not only was the right of the United States to recover the land defeated, but Donovan was precluded from thereafter asserting his claim to the land as against such *bona fide* purchaser. His denial that the legal title passed is based upon the contention that Donovan, before the year 1871, when the Secretary of the Interior certified this land to the State had, as stated by counsel, initiated proceedings to obtain this land in section 35 as a homestead, and had done all he could to make entry thereof, and had been in possession for three years before this certfication, and that prior to 1871 an initiatory title had passed from the United States to Donovan by reason of his possession and offer to enter the land, and his payment of the fees and expenses to the local land officers, so as to prevent the passage of the legal title to the State, by virtue of the certification referred to, which, by reason of the acts of

Donovan, was rendered wholly void. It is also asserted that if the United States, in 1871, did retain title in itself, notwithstanding Donovan's occupation and cultivation of the land, yet such occupation and cultivation withdrew the land from the jurisdiction of the Land Department, so far as any right or power to issue a certification to the railroad company was concerned, just as effectually as though the land had been reserved or otherwise appropriated specifically by an act of Congress.

We think that in 1871, when the certification was made, jurisdiction over this land remained in the Land Department, to be exercised by the Secretary of the Interior, notwithstanding the acts of Donovan as shown by this record. It is shown by the testimony of Donovan himself and of his witness Bullis, putting it all together, that there never was, in fact, any entry of this land at the local land office, in the name of Donovan, before the certification in 1871. The facts as to what took place at that office in regard to the applications of Donovan in 1867 before the Barclay entry was cancelled, and in June, 1868, when the entry was made for the lot in section 26, are set forth in the statement of facts herein, and need not be repeated. The statement shows no such facts as put Donovan in the place of one who, having done all he could to enter the land, had been refused such entry, but had nevertheless not acquiesced in such decision and had taken possession of it as a homestead. On the contrary, Donovan did acquiesce in that decision and amended his application.

There was no entry made on the books of the local land office for this land under the amended application, and the power of the Secretary of the Interior to make the certification, even if we assume that it was erroneously exercised, was not an act which was beyond the jurisdiction of the Secretary. The legal title was thus transferred by the Government to the State, and at the most it was an erroneous certification within the meaning of the act of 1887. Although under such circumstances, if the certification were erroneous and might have been avoided and the land recovered back by the Government while in the hands of the railroad company, yet Woodwick, if a purchaser in good faith of the lands, was entitled to them under the provisions of the act. He had no notice, actual or constructive, of the claim of the Government in regard to this land. The record title was plain. No suit had been commenced when Ericksrud took his title from the Government and went into possession thereunder. He died within a week thereafter, and his heirs thereupon took possession. They were in possession when the Government commenced this suit, in 1893, but were never served with process therein until 1901, which was two years after Woodwick had purchased the property from them and had in good faith paid them the sum of $2,000 in cash for the land.

Counsel for the Government admits that it is futile to maintain that Woodwick had constructive notice of the defects in his title by reason of

the pendency of this suit, which had been commenced by the Government in 1893, but in which the railroad companies alone had been served with process.

Whatever equities Donovan may have had as against the Government by virtue of his so-called attempt to make entry for the eighty acres in section 35, they do not override the plain provisions of the statute of 1887, and also that of 1896, (29 Stat. 42,) which save the rights of one who purchased from the railroad in good faith.

As was observed by Mr. Justice Brewer, in the case already referred to, (*United States* v. *Winona &c. R. R. Co.*, 165 U. S. at 480,) "It matters not what constructive notice may be chargeable to such a purchaser if, in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the Government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands."

Donovan is not brought within the case of *Winona &c. R. R. Co.* v. *United States*, immediately following the above-cited case, at page 483, because, among other facts, it appears herein that there was no record of any entry in Donovan's case for this land on the books of the local land office, and it is conceded that he had been out of any possession of the land since 1885. The above-cited case is not, therefore, in point. The same may be said of *Duluth* v. *Roy*, (173 U. S. 587,) and *Oregon &c.* v. *United States*, (Nos. 1 and 2,) (189 U. S. 103–116.)

Donovan cannot be regarded as having by his action secured a vested interest in this land, so as to make the certification to the State a wholly void act, as an act beyond the jurisdiction of the Secretary. Assuming that it may have been erroneous and voidable, it was not void. We do not decide it was erroneous. In 1871 the legal title, still remaining in the Government, was transferred to the State by the certification of the Secretary, and, as we have said, Woodwick occupied the position of a purchaser in good faith under the acts of Congress.

The judgment is *Affirmed.*

True copy.

Test:

Clerk Supreme Court, U. S.